87-1678

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

LEE SECK MON, DELIA CHAN WAI SHEUNG AND FAMOUS HORSE GARMENT FACTORY, LTD.,
Petitioners,
vs.
GUESS?, INC., GEORGES MARCIANO, MAURICE MARCIANO, ARMAND MARCIANO AND PAUL MARCIANO,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, subsequent to the enactment of the Copyright Act of 1976, a state court is preempted from entertaining a claim involving copyrightable subject matter whether or not the work is within the public domain?

2. Whether, subsequent to the enactment of the Copyright Act of 1976, a state court is preempted from entertaining a claim for copying of allegedly proprietary information whereby the copying was accomplished through an alleged breach of fiduciary duty?

3. Whether, in a case where copyright type damages, *i.e.*, profits from the alleged infringement, are pleaded and the gravamen of the complaint involves copying, preemption may be avoided by couching the complaint as one for breach of fiduciary duty?

4. Whether, subsequent to the enactment of the Copyright Act of 1976, a state court is preempted form entertaining claims of misappropriation and unfair competition where the gravamen of the lawsuit is the alleged copying of plaintiffs' work?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are plaintiffs Georges Marciano; Maurice Marciano; Paul Marciano; Armand Marciano and Guess?, Inc., a corporation, and defendants Joe Nakash; Ralph Nakash; Avi Nakash; Al Goldbert; Steve Baum; Michael Hayes; Lee Seck Mon; Delia Chan Wai Sheung aka Mrs. Lee Seck Mon; Jordache Enterprises, Inc., a corporation; Maurice Sasson; Ltd., a corporation, dba KIKIT by Sasson; Maurice Sasson; Shamir Fashions, Inc., a corporation; M&B Trading Co., dba Jeanjer, a corporation; Bebo Kobo; Ditto Apparel of California, Inc., a corporation; JRA Apparel Manufacturing, Inc., a corporation; Famous Horse Garment Factory, Ltd., a corporation; Lucky Horse Garment Factory, Ltd., a corporation; Goodyear Industrial Corporation, a sole proprietorship; Famous Label International Co., Ltd., a corporation; Jordache International (Hong Kong), Ltd., a corporation; Cherry Empire, Ltd., a corporation; Kabag Company, Ltd., a corporation; Bluetex Company, a sole proprietorship; Krio Trading, Ltd., a corporation; Rose Trading Company, a sole proprietorship; FriendshipTrading Company, a sole proprietorship; U.F. Factors, a corporation; Gasoline, Ltd., a corporation; Georges Marciano, Inc., a corporation; Maurice Marciano, Inc., a corporation.

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No. _____

IN THE

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LEE SECK MON, DELIA CHAN WAI SHEUNG AND FAMOUS HORSE GARMENT FACTORY, LTD.,

Petitioners,

vs.

GUESS?, INC., GEORGES MARCIANO, MAURICE MARCIANO, ARMAND MARCIANO AND PAUL MARCIANO,

Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a Writ of Certiorari issue to review the decision of the Superior Court of the State of California, entered on September 28, 1987. A Petition for Writ of Prohibition and/or Writ of Mandate was summarily denied by the California Court of Appeal, Second Appellate District, Division One, on October 26, 1987. The California Supreme Court denied a Petition for Review on January 6, 1988.

CITATIONS TO OPINIONS BELOW

None of the courts below wrote an opinion but the transcript of the hearing before the Superior Court relating to the claims of preemption is printed as part of the Appendix to this petition. A copy of the denials by the California Court of Appeal and the California Supreme Court are also included within the Appendix.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, §8, Clause 8 of the Constitution of the United States:

> "The Congress shall have Power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

Article VI of the Constitution of the United States:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Title 17 U.S.C., §101, *et seq.*, The Copyright Act of 1976, and, in particular, 17 U.S.C. §301:

> "(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.
>
> (b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes or any State with respect to —
>
> (1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or
>
> (2) any cause of action arising from undertakings commenced before January 1, 1978; or
>
> (3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106.

(c) With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2047. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from undertakings commenced on and after February 15, 2047. Notwithstanding the provisions of section 303, no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2047.

(d) Nothing in this title annuls or limits any rights or remedies under any other Federal statute."

STATEMENT OF THE CASE

Respondents, the Plaintiffs in the Trial Court, have sued Petitioners, Lee Seck Mon, Delia Chan Wai Sheung and Famous Horse Garment Factory, Ltd. for, *inter alia*, misappropriation of information including dress patterns, markers, design specifications and other production material allegedly belonging to plaintiffs and use of that information to copy or "knock off" Guess ? clothing for the benefit of co-defendant Jordache Enterprises, Inc. Respondents also include claims of breach of fiduciary duty and unfair competition based upon the same general set of allegations of copying which form the basis of their misappropriation claim.

Petitioners challenged the jurisdiction of the Trial Court to entertain the "copying" claims on the ground that those certain causes of action were preempted pursuant to the Supremacy Clause of the United States Constitution and

the language and effect of Title 17 U.S.C. §301. The California Trial Court held that plaintiffs' claims were not preempted.

Petitioners then timely petitioned the California Court of Appeal for a Writ of Prohibition and/or Writ of Mandate with respect to the question of preemption. The petition was summarily denied on October 26, 1987.

Petitioners then filed a timely petition for review with the California Supreme Court. That petition was denied on January 6, 1988.

Thus, the effect of the Trial Court's decision in this case is to afford relief for matters which Congress has determined to be within the exclusive province of the District Courts of the United States.

REASONS FOR GRANTING THE WRIT

1. The State Court's ruling violates the Congressional intent of establishing a unified body of federal protection for creative works and explicitly preempting all states laws which created or protected "rights that are equivalent to any of the exclusive rights within the general scope of copyright," which was achieved by the enactment of the Copyright Act of 1976.

From the beginning of efforts to reform the copyright law, federal preemption of overlapping or equivalent state laws was a primary goal. Fetter, *Copyright Revision and the Preemption of State "Misappropriation" Law*, 25 Bull. Copyright Soc. 367, 394 n.99 (1978) (hereinafter "Fetter"). Preemption was described as "perhaps the most fundamental issue underlying the entire revision program." Fetter at 394, n.99 *citing* Register of Copyrights, *Copyright*

Law Revision, Part 6, Supplementary Report of the Register of Copyrights at 81 (1965). Indeed the broad preemption principle expressed in Section 301 was described in the House Report[1] as one of the "bedrock provisions" of the Act. *House Report* at 129.

The Congressional intent is therefore very clear that Section 301 is to be broadly interpreted *in favor of preemption*:

> "The intention of section 301 is to preempt and abolish any rights under the common law or statutes of a State that are equivalent to copyright and that extend to works coming within the scope of the Federal copyright law. The declaration of this principle in section 301 is intended to be stated in the clearest and most unequivocal language possible, so as to foreclose any conceivable misinterpretation of its unqualified intention that Congress shall act preemptively, and to avoid the development of any vague borderline areas between State and Federal protection."

House Report, at 130.

The congressional intent was recognized in *Orth-O-Vision, Inc. v. Home Box Office*, 474 F.Supp. 672 (S.D.N.Y. 1979) where the court termed Congress' intention to preempt a state cause of action for misappropriation of a party's video transmission signal as "quite explicit." 474 F.Supp. at 683.

For purposes of preemption under §301, it is sufficient if the work falls within the general category of works which may qualify for copyright protection . . .." *Harper & Row,*

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[1] House Committee on the Judiciary, H.R. Rep. No. 94-1476, 94th Cong., 2nd Sess. (1976).

Publishers, Inc. v. Nation Enterprises, 501 F.Supp. 848, 851 (S.D.N.Y. 1980), *affirmed*, 723 F.2d 195 (2d Cir. 1983), *rev'd on other grounds*, 471 U.S. 529 (1985). In other words, the phrase "within the subject matter of copyright" refers not only to things Congress has said are copyrightable, but also *things that are not*. For example, even though a work may be fixed in a tangible medium and otherwise meets the requirements of §102, it may nevertheless not be amenable to copyright protection at all. Dress designs are one such category. *Nimmer on Copyright*, §208[H][1], (perm. ed. rev. 1987) (hereinafter "Nimmer").

As the House Committee on the Judiciary Report regarding the Bill that became the Copyright Act of 1976 stated:

> "[A]lthough the shape of an industrial product may be aesthetically satisfying and valuable, the Committee's intention is not to offer it copyright protection under the bill. Unless the shape of an automobile, airplane, *ladies' dress*, food processor, television set, or any other industrial product contains some element that, *physically* or conceptually, can be identified as *separable* from the utilitarian aspects of that article, the design would *not be copyrighted* under the bill."

House Report, p. 55. (Emphasis added.)

Section 301 of the Copyright Act of 1976 was intended, in part, to codify constitutionally-grounded preemption of state regulation of matters intersecting with the federal copyright laws mandated by this Court in *Sears Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964) and *Compco Corp. v. Dry-Brite Lighting Co.*, 376 U.S. 234 (1964).

In *Sears* and *Compco*, this Court held that a state statute which prohibited copying of an unpatented and uncopyrighted item was unconstitutional because it conflicted with

paramount Federal law. The holdings of *Sears* and *Compco* were not based on the type, extent or *method* of the copying involved. Thus, "[I]f the design is not entitled to a design patent or other federal statutory protection, then it can be copied at will." 376 U.S. at 238.

In the instant case there is no claim that the patterns, markers, designs and styles of plaintiff Guess? were covered by copyright and indeed they are not. ("Statutory copyright protection is largely unavailing for dress designs . . .." Nimmer §208 [H][1].) (Copyright "will not protect against the embodying of the design in competitive garments." *See, Russell v. Trimfit, Inc.*, 428 F.Supp. 91 (E.D. Pa. 1977).) Nevertheless, the Superior Court concluded that because plaintiffs couched their complaint in terms of breach of fiduciary duty, misappropriation and unfair competition, the conduct alleged is not preempted by Federal law even though the gravamen of the complaint is copying and even though plaintiffs seek defendants' profits from the alleged infringement. The Superior Court's interpretation finds no support in either the history of the Copyright Act or the case law interpreting its provisions.[2]

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[2] Plaintiffs' theory, as it has been developed in this case, is that defendant Jordache, acting with the assistance of the Lees, copied Guess' styles in order to capitalize on its success in the jeans marketplace. Such a theory has been expressly rejected on the ground of preemption. Thus, in *Sinatra v. Goodyear Tire & Rubber*, 435 F.2d 711 (9th Cir. 1970), *cert. denied* 402 U.S. 906 (1971), the plaintiff alleged that defendant had copied her recorded performance of a particular musical composition; that plaintiff had, through her recording, developed a secondary meaning in that performance; and that defendants by copying that performance were attempting to cause confusion in the minds of the public and were thereby "passing off" their performance as being that of plaintiff. The trial court entered summary judgment for defendant.

The Ninth Circuit affirmed, holding that plaintiff's claim was barred by this Court's decisions in *Sears* and *Compco*:

(Footnote continued.)

2. The Superior Court decision is directly contrary to settled federal decisional law that a plaintiff may not evade the mandate of preemption by including claims of misappropriation, unfair competition and breach of fiduciary duty to the extent that those claims seek to redress rights that are equivalent to rights granted under Title 17 U.S.C. Further, the Superior Court's decision is in direct conflict with a Ninth Circuit Court of Appeals decision in *Del Madera Properties v. Rhodes and Gardner, Inc.*, 820 F.2d 973 (9th Cir. 1987) which held that a claim of misappropriation by breach of fiduciary duty was preempted.

The statutory test to be applied under Section 301 is one which looks to the rights or property interests plaintiffs claim would be protected if the requested state relief was granted. Regardless of the label placed on the claim, the question is the same: is the plaintiff requesting relief for a right "equivalent to any of the exclusive rights . . . within the general scope of copyright as specified by Section 106?" If so, Section 301 mandates a finding that the state claim is preempted. In light of the demonstrated Congressional desire for "unequivocal" preemption of state law, and the influence thereupon of *Sears-Compco*, any question as to

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"[A]s Judge Hand pointed out in his dissent in *Capitol Records, Inc. v. Mercury Records Corp.*, 221 F.2d 657, 666-667 (2d Cir. 1955) to allow unfair competition protection where Congress has not given federal protection is in effect granting state copyright benefits without the federal limitations of time to permit definite public domain use." 435 F.2d at 718.

whether a given state right or remedy is "equivalent" to copyright should be resolved in favor of preemption.

The Federal Courts have regularly held that state claims of unfair competition predicated on copying are preempted under 17 U.S.C. §301. *Motown Record Corp. v. Hormel*, 657 F.Supp. 1236 (C.D.Cal. 1987); *Universal City Studios, Inc. v. The T-Shirt Gallery, Ltd.*, 634 F.Supp. 1468 (S.D.N.Y. 1986); *Durham Industries, Inc. v. Tomy Corp.*, 630 F.2d 905 (2d Cir. 1980).

A similar analysis under the rule of *Sears-Compco* demonstrates, as well, that the state law claims contained in the Complaint filed by Guess? and the Marcianos are preempted. *Jacobs v. Robitaille*, 406 F.Supp. 1145 (D.N.H. 1976). Similarly, in *Triangle Publications, Inc. v. Sports Eye, Inc.*, 415 F.Supp. 682 (E.D. Pa. 1976), the court ruled that:

> "[T]he *Sears-Compco* decisions have been understood as holding that state regulation of unfair competition is preempted as to matters falling within the broad confines of the copyright clause of the United States Constitution.
>
> * * *
>
> In the instant case, Congress has taken action to afford copyright protection to the paper which plaintiff publishes. This is precisely the situation where the *Sears-Compco* preemption doctrine remains applicable." 415 F.Supp. at 686 (footnote omitted).

If the underlying right asserted in plaintiffs' causes of action is outside the protection of the Copyright Act, because the underlying material, although a "writing," does not meet the standards of copyrightability, then *Sears-*

Compco would preempt those claims. If copyright protection is denied, therefore, defendants would have "every right to" copy the work under federal law, and the state law remedies claimed by plaintiffs cannot be permitted to "clash [ ] with the objectives of the Federal [copyright] law." *Sears Roebuck Co. v. Stiffel Co., supra,* 376 U.S. at 231. *See, also, Mitchell v. Penton/Industrial Publishing Co.,* 486 F.Supp. 22 (N.D.Ohio 1979). On the other hand, if copyright protection is afforded, then the *exclusive* right to recovery is under Title 17.

In *Mitchell v. Penton/Industrial Publishing Co.,* 486 F.Supp. 22 (N.D.Ohio 1979), the court, in dismissing the misappropriation claim, noted that if the material in question was copyrightable and infringed, Section 301 would operate to preempt the state claim. If the material was not infringed or the copyrights were not valid, however, *Sears-Compco* would bar the state claim:

> "Should the plaintiff prevail on its first cause of action demonstrating that its registered copyrights have been infringed, and the defendants fail in any defense and counterclaim of copyright invalidity, plaintiff's count of 'misappropriation,' an alternative claim by plaintiff's own characterization, would become redundant. However, should plaintiff Mitchell fail to prove infringement or if infringed, defendant should show that the copyrights are invalid, then *Sears* and *Compco* come into play. These cases hold that once patent protection (similarly copyright protection) is denied, the alleged infringer has 'every right to' copy the patented product or copyrighted work of authorship. Plaintiff alleges 'misappropriation' by Penton of 'many of the factual recitations contained within Records Retention.' If proved, such claim asserts in effect, if not in substance,

> what Stiffel and Sun-Brite unsuccessfully claimed in *Sears* and *Compco*." 486 F.Supp. at 26.[3]

Turning specifically to the claims in the instant case, with respect to Plaintiffs' finished garments and the design material on which they are based, one of two things is true: either there are copyrightable features of their garments which, in and of themselves, are capable of copyright protection, or there are not. In the first case, Plaintiffs must bring these cases under Title 17 in federal court which has *exclusive* jurisdiction over copyright claims. In the second case, if there are no design features of the garment that are independently copyrightable, *i.e.*, independent of the utilitarian nature of the garments, then no cause of action may be brought anywhere; under *Sears-Compco* and 17 U.S.C. §301, if the design cannot be protected under copyright, then the state cannot grant broader protection to these designs than are given to them by federal law.[4]

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[3] To the same effect is *Schuchart & Associates, Professional Engineers, Inc. v. Solo Serve Corporation*, 540 F.Supp. 928 (W.D. Texas 1982).

[4] For example, in *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1980), plaintiff sued for, *inter alia*, copyright infringement and unfair competition regarding his song "When Sunny Gets Blue" by the parody "When Sonny Sniffs Glue." The Court, addressing plaintiff's unfair competition claim, held that it was preempted:

> "Assuming *arguendo* that the false claiming of authorship constitutes a separate tort under California law, such a cause of action is nevertheless preempted by federal law. In *Compco Corp. v. Day-Bright Lighting, Inc.*, 376 U.S. 234, 84 S.Ct. 779, 11 L.Ed.2d 669 (1964), and *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 84 S.Ct. 784, 11 L.Ed.2d 661 (1964), the Supreme Court determined that the Supremacy Clause of the United States Constitution, U.S. Const. Art. VI, precludes the states from protecting types of intellectual property that are already covered by the federal copyright or patent laws. Sears and Compco 'ma[k]e it very clear that just

(Footnote continued.)

That plaintiffs may not cloak their "copyright" case in terms of misappropriation, unfair competition or breach of fiduciary duty, was reaffirmed by the Ninth Circuit in *Del Madera Properties v. Rhodes and Gardner, Inc.*, 820 F.2d 973 (9th Cir. 1987). In *Del Madera*, the Ninth Circuit affirmed dismissal of plaintiffs' unfair competition and unjust enrichment claims.

The facts of *Del Madera* are as follows: Del Madera and co-plaintiff Leonard Cahn engaged the defendant engineering firm Rhodes and Gardner, Inc., co-defendant McCart as consultant and an architectural firm to prepare plans and signs to develop a certain parcel of land. The Tentative Master Plan Map ("Map") contained proposed lots, roads and spare spaces. After town approval of the plans, plaintiff went into bankruptcy and defaulted on the property. The new owners hired the same engineers and architects as had Del Madera. Subsequent to the foreclosure, Del Madera had registered its claim of copyright in the Map. The registration listed Cahn as the author who assigned the copyright to Del Madera. Del Madera then brought suit against defendants claiming that they infringed the copyright in the Map by using the Map to develop the property. Plaintiff further claimed that the defendants misappropriated the time and effort Del Madera expended to create the Map, and that defendants also benefited from

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as a state could not encroach upon the federal patent laws directly it could not do so indirectly under the guise of enforcing its laws against unfair competition where those laws would clash with the federal objectives." *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711, 717 (9th Cir.1970), *cert. denied*, 402 U.S. 906, 91 S.Ct. 1376, 28 L.Ed.2d 646 (1971). "The same applies to the copyright statute. Accordingly, the kind of misappropriation alleged by the composers can be redressed, if at all, only under federal law." *Id.* at 440.

plaintiffs' efforts in obtaining town approval and were thereby unjustly enriched. Plaintiff sued in unfair competition *alleging breach of fiduciary duty*. The Ninth Circuit held that the claims were preempted by 17 U.S.C. §301.

In so holding, the Ninth Circuit first considered whether the claimed work was within the subject matter of copyright and found that the Map and all of the work supporting it fell within 17 U.S.C. §102. The court further held that misappropriation of an author's talent and effort in creating a work is precisely the type of misconduct that the copyright laws are designed to protect against, citing *Mayer v. Josiah Wedgwood & Sons, Ltd.*, 601 F.Supp. 1523 (S.D.N.Y. 1985).

The court next considered whether plaintiffs' claims of unfair competition and breach of fiduciary duty were equivalent to rights specified by §106 of the Act. That part of plaintiffs' unfair competition claim that pertained to misappropriation of time and effort in creation of the Map was based on an alleged breach of fiduciary duty by Martha McCart, a principal of the consulting firm. Del Madera argued that when McCart provided services to the defendants which enabled them to develop the property using documents and information she acquired while a joint venturer in the Del Madera joint venture, she breached her fiduciary duty to Del Madera, a breach which the defendants allegedly induced. The plaintiffs' argument was constructed upon the premise that the documents and information McCart furnished to the defendants belonged to Del Madera and were misappropriated by the defendants.

The court in its preemption analysis found that no "extra element" was present that *changed* the nature of the action, stating:

> "Del Madera's ownership of this material, and the alleged misappropriation by the defendants, are part and parcel of the copyright claim. Thus, Del Madera's unfair competition claim for misappropriation of its time and effort expended in producing the Tentative map and supporting documents is preempted." *Id.* at 977.

The Court then affirmed dismissal of plaintiffs' unjust enrichment claim on preemption grounds because the foundation of Del Madera's unjust enrichment claim was its contention that the defendants violated an implied promise, based on the parties' relationship, not to use the Map and supporting documents. However, an implied promise not to use or copy materials within the subject matter of copyright is equivalent to the protection provided by section 106 of the Copyright Act.

Similarly, in the present case, plaintiffs ask for an adjudication of breach of fiduciary duty based essentially on a claim of copying of their designs or design material. However, their claim fails to add any extra element to a right granted or denied by Title 17. Although preemption is mandated, the Superior Court refused to follow *Del Madera.*

The Superior Court erred in allowing plaintiffs to circumvent the effect of preemption by including a claim for misappropriation. That claim is nothing more than a rather transparent attempt to redress alleged violations of rights that are clearly rights equivalent to §106. As Professor Nimmer has stated, "It must be concluded, then, that in this context misappropriation is but another label for reproduction, and as such, is a right 'within the general scope of copyright' under Section 301(a)." *Nimmer* §1.01[B] p. 1-19. The common law remedy for misappropriation is "equivalent" to copyright, since the policy justification usually given for the two remedies is virtually identical.

They both seek to prevent others from copying work product for a period of time. Stripped of their disguises both rights seek to redress an unauthorized interference with the normal operation of a company's legitimate business precisely at the point where the profit is to be reaped, in order to divert a material portion of the profit from those who have earned it to those who have not; with special advantage to a defendant in the competition because of the fact that it is not burdened with any part of the expense of gathering. Both Title 17 and state law of misappropriation protect these interests, and the foundation therefore exists for a strong argument of equivalence, resulting in federal preemption of state misappropriation as to all subject matter "attended" by the 1976 Copyright Act.[5]

3. Because of unclear language in the House Report, the Superior Court has improperly decided an important question of federal law which has not been settled by this Court, but should be.

The question involves the exclusive application of the Copyright Act of 1976 to a situation where a plaintiff attempts to recover for "copying" under the guise of misappropriation, unfair competition or breach of fiduciary duty.

Although the Congressional intent (as reflected in the House Report) makes clear that the scope of preemption is

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[5] See, Fetter at 409: the underlying conduct implicated in a "misappropriation" claim and expounded as the classical basis for the action does not stand scrutiny as non-equivalent in this sense. To grant relief against a competitor's "misappropriation" of one's labor and investment by imitation, use or copying of material is to act on a restatement of the policies which underlie the grant of exclusive federal rights under section 106.

to be given a broad interpretation, the House Report also states that certain common law torts would remain unaffected so long as they contain elements different in kind from copyright infringement. The Report gives the example that the unfair competition tort known as "interference with contractual relations," to the extent it is equivalent to copyright, would be preempted. This example highlights the problem because neither §301 nor the House Report provide any guideline as to what factors a court should review to determine if a claim for unfair competition is basically a claim for copying.

The tort of "interference with contractual relations," for example, always contains elements different from copyright infringement; however, certainly if the gravamen of the complaint is copying and/or the recovery sought is based on profits or damages per each infringing item, then certainly that cause of action should be preempted. Unfortunately however, the state courts can avoid that result, as happened here, by merely focusing on that portion of the House Report that provides examples of torts that may not be preempted, *e.g.* breach of confidentiality, if those torts contain elements "different in kind" from copyright infringement. The phrase "different in kind from copyright infringement" is misleading for the reasons stated above, viz. breach of confidence will always have some different elements from copyright infringement. Surely, what Congress meant was that if the gravamen of the complaint is copying, then preemption should lie.

In the instant case, since plaintiffs allege misappropriation, unfair competition and breach of fiduciary duty and seek profits for an alleged infringement, *i.e.*, the same remedy afforded by Title 17, then it may fairly be concluded that in *this* context these claims are preempted. *See, e.g., Del Madera Properties v. Rhodes and Gardner, Inc., supra.* However, because §301 provides no guidelines on

"equivalency" of rights of copyright and because the House Report suggests that these claims will not always be preempted, clarification is needed by this Court regarding the context wherein state claims will be preempted in order to prevent state usurpation of federal law in cases where preemption was surely contemplated by Congress.

CONCLUSION.

For the reasons stated above Petitioners request that this Court issue a Writ of Certiorari in the instant case.

Respectfully submitted,

R. DAVID JACOBS*
Coudert Brothers

Attorney for Petitioners

*Counsel of Record

APPENDIX A

Superior Court of the State of California
for the County of Los Angeles

Department No. 44 Hon. Norman L. Epstein, Judge

Georges Marciano et al.,
Plaintiffs,

vs. No. C 524 347

Joe Nakash, et al.,
Defendants.

REPORTER'S PARTIAL TRANSCRIPT OF PROCEEDINGS

MONDAY, SEPTEMBER 28, 1987

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RICHARD SCHAUER
PROVISIONAL DIRECTOR

Los Angeles, California;
Monday, September 28, 1987; 9:10 a.m.

— 000 —

The Court: Thank you. Good morning.

Mr. Freedman: Good morning

The Court: This is Marciano versus Nakash and many others, and I will take the appearances, as I usually do, starting at the counsel table on my left.

Mr. Freedman: Gary Freedman, your Honor, on behalf of Guess?.

Mr. Shlachter: Robert Shlachter of Alschuler, Grossman & Pines on behalf of the Marcianos.

Mr. Grossman: Good morning your Honor. Marshall Grossman, same appearance as Robert Shlachter. And also present is John Schwimmer on behalf of the Marcianos.

Mr. Kreps: Allyn Kreps from Jones, Day, Reavis & Pogue for the Nakashes, Jordache Enterprises and Jordache related defendants. And I would like to introduce Girard E. Boudreau who is the managing partner of Jones, Day, who is here for the sole purpose of arguing the motion with respect to enjoining Jones, Day, and Paul, Weiss.

The Court: Thank you. Welcome to the court, Mr. Boudreau.

Mr. Cochrane: John Cochrane of Jones, Day on behalf of the Nakashes.

Mr. Jacobs: David Jacobs of Coudert Brothers on behalf of Lee Seck Mon, Delia Chan Wai Sheung, and Famous Horse Garment Factory, Ltd.

Mr. Lorch: Gary Lorch, same law firm, same defendants.

The Court: All right. Again I recognize the presence of the provisional director Judge Schauer and counsel for Judge Schauer.

Ms. Bresler: Emily Bresler of Hufstedler, Miller, Carlson & Beardsley, corporate counsel to Guess?.

The Court: Not counsel for the provisional director. And Gavin Miller.

Mr. Miller: Yes.

The Court: There was a request that a document be filed under seal. It extracts minutes of the board meeting. I have granted that. I will comment that I am not sure what the utility of the order is because so much is set out in the argument. But for what good it will do I have granted it.

Next I will deal with the evidentiary objections, which are brief in the context of this litigation. First, the objections to the declaration of Gary Freedman in the numerical order that they are presented. One, two, and three are overruled; four is sustained, conclusion; five and six, overruled.

The declaration of Antonio Sarabia, one, two, three and four, overruled; five, sustained as to the term "extensive". It's conclusionary and it's vague, otherwise the objection is overruled. Paragraphs six, seven, eight, nine, ten, eleven, all overruled. Paragraph twelve, sustain, lack of personal knowledge. Thirteen, fourteen, overruled.

The declaration of Robert Shlachter, all objections are overruled.

The declaration of Maurice Marciano, overrule one and two, sustain three as to what anyone but the declarant knew. That's a conclusion, otherwise overruled. Sustain four on the same basis as three. I am referring to the term "we."

I will deal first with the motion for judgment on the pleadings.

Mr. Freedman: Your Honor — Your Honor, for the record there are additional evidentiary objections —

The Court: Filed when?

Mr. Freedman: Our evidentiary objections — The evidentiary objections on behalf of Guess? Were filed on Friday morning or Friday.

The Court: They must have been filed after I left. I had to go home ill on Friday. I never saw them. If you want to press them now we will take them up one by one.

Mr. Freedman: No, your Honor.

Mr. Cochrane: Your Honor, if I might.

The Court: Yes, sir.

Mr. Cochrane: There are also evidentiary objections that I bring to the court's attention filed this morning because the reply papers were received by us on Friday at 4:35. There was no other way to get an objection before you except by document this morning.

The Court: This is an objection to documents with respect to what?

Mr. Cochrane: With respect to the reply declaration of Gavin Miller, which was filed with the court on Friday afternoon.

The Court: I haven't seen Mr. Miller's declaration filed Friday afternoon. I wasn't aware that one had been filed Friday afternoon. But if you want to go through these objections I will read his declaration and we will go through the objections one by one. Do you want to do that?

Mr. Cochrane: No, your Honor.

The Court: All right. We will proceed on the Motion for Judgment on the pleadings.

I have read the papers on both sides to this motion as well as the other matters that we are going to consider this morning. And I think I have your arguments well at hand. If there is anything that moving party feels it's incumbent to address or emphasize I will hear you now. But please bear in mind I have read what you have presented.

Mr. Jacobs: That includes the Reply Memorandum?

The Court: I have read everything that was filed as of Friday morning.

Mr. Lorch: That should include it.

The Court: I believe there is a Reply Memorandum to this that I did read.

Mr. Lorch: That was filed on Thursday?

The Court: Yes. In fact, I distinctly remember it.

Mr. Jacobs: Your Honor said that you are familiar with the papers. I know that you are familiar with the area of law because we quoted certain sections. I would — at this time I don't believe I have anything to add other than what's in the papers — I think the papers are rather complete — other than to say that from our review of the pleadings the basic gravamen of the complaint appears to be one for copying, which is covered by Title 17.

If the court has questions or it would like areas of the Argument elucidated I would be happy to.

The Court: No, I don't have questions. And I think you elucidated your position substantially in the papers. I do have a fundamental problem with your position, though.

As I read the complaint the gravamen has to do with the breach of fiduciary obligation that is claimed to have occurred, and there is a conspiracy and agency allegation with respect to your client — clients, and the Nakashes, and the Jordache entities. There was a fiduciary obligation owed to Guess? by the Nakashes.

I am not satisfied that the copyright act precludes a suit on the theory that is presented here. To be sure, copying is involved. But as I say, the essence of these claims, it appears to me, goes to the violation of a fiduciary obligation by taking advantage of secret material that was put in the hands of the defendants by reason of their occupying a

fiduciary post, and then their abusing the trust that had been reposed in them by taking advantage of the secret material and using it to their own end and gaining an advantage that others might not have had.

I read the *Sammons* case, for example, which talks about — I believe that's the one — the advantage that someone obtained by saving the time for reverse engineering. It has been shown in this case and it's the theory of the plaintiffs that while it's possible to copy any garment apparently, one is advantaged in copying it if that person has the markers and the kinds of material that were sent.

I think I am getting beyond where I want to go. And your motion is judgment on the pleadings and I have been speaking of evidence. But I do that just for the purpose of illustration. What I wanted to focus on is what I think is the gravamen of the cause of action against your client. As I say, I don't think they have asserted a claim which is foreclosed by the Copyright Act.

Now, if you have a case that involves breach of fiduciary obligation to effect a copying similar to what is alleged here — obviously, I don't require that it be on all fours, by any means — I would appreciate your calling my attention to which case it is. I have looked at your authorities and I don't find any that does that. I do find some that use terms like misappropriation rather broadly. And I would agree with you that the term is so broad that it does have proper meaning that would invoke a supremacy clause problem. But I don't recall any of your cases that could properly be described to be similar to the situation that is pleaded here. But, again, if you have one in mind that is remind me what it is.

Mr. Jacobs: We do have a case that specifically references fiduciary duty. And that's the Del Madera Properties

versus Rhodes and Gardner case. That should be number four in our —

The Court: Uh-huh. Yes.

Mr. Jacobs: Yes, sir. On page 978 under little a, unfair competition. I am sorry, your Honor. 977 under (b) (1) under unfair competition.

There was an allegation in this case — and let me put it in context for you. Yes, under (b) (1) on page 977 there is an allegation — the specific cause of action in the complaint is for unfair competition. It's unfair competition based on an alleged breach of fiduciary duty. And although this case found that that allegation did not in the context of that case — as I believe as in the context of this case, does not give you the sufficient extra added element to —

The Court: What was the nature of the breach?

Mr. Jacobs: The nature of the breach was use of materials.

The Court: That is turning of materials over to another by a fiduciary who had them by reason of a fiduciary post?

Mr. Jacobs: Well, yes and no. Yes, that was the allegation. No, because the court found the person who in fact turned them over did not have a fiduciary duty.

The Court: All right. Let me reread the portion that you have in mind. It's the — it's on 977 —

Mr. Jacobs: I think if you start under (b), equivalent rights, your Honor.

The Court: Sure. Just a second.

Well, I am looking at headnote five, which seems to distinguish our situation. Would you like to comment about that.

Mr. Jacobs: If your Honor could give me a hint as to how he believes this distinguishes our situation.

The Court: All right. I didn't mean to be so cryptic. Well, the court says that the argument about Ms. McCart misappropriating is itself based on the premise of the documents and information that she furnished to the defendants belonged to Del Madera, and Del Madera's ownership are part and parcel of the copyright claim. So if I am reading this correctly, if the premise that they owned it is dependent on a copyright kind of issue, then you don't have any added element. And there seems to be an inference that if that were not true, if it were established that they owned it without regard to a copyright theory, then there might have been a misappropriation.

Mr. Jacobs: Well, your Honor, I think in this case it just so happens that somebody went out and got a copyright. If that had been done in this case; for example, if the Marcianos had gone out and gotten a copyright, which they could have done, for the stuff that was copyrightable, then I don't think you would have the distinguishing factor that you are referencing. But the fact that they didn't go out and do it, and could have done it, I don't think is really a distinguishing factor.

I think where you have to go to is what is the claimed harm and what are they really complaining about. What they are really complaining about is that you took something that belonged to me and copied it. And if the thing that they took and copied is within the subject matter of the copyright, whether they went ahead and registered it or not, then I think it falls under Title 17.

Now, you can always couch your complaint to come in through the back door and try to avoid a Title 17 preemption argument. Of course, it has been tried several times, which is why we have a lot of preemption cases. The courts by and large don't countenance that. You have to look at what they are really complaining about. The papers that we have seen and the arguments — almost every time

we are here we are talking about copying. We are talking about copying styles and design features. And I remember sitting in the back before the Lees really got involved in this case on a substantive basis and saying why are we talking about copying all the time. If we are talking about copying we really should be in a federal courthouse because of the Title 17-type problem.

The fact that someone is suing for fiduciary duty, or misappropriation or unfair competition, if what they are talking about is you breached the duty because of copying, that's a Title 17 problem. Del Madera and the other cases that talk about misappropriation distinguishing from what plaintiffs have argued in their papers where they say it's limited to an appropriation, not misappropriation, means that just because you have what looks like a colorable state of claim does not mean it takes it out of the ambit of Title 17. If what you are talking about was done; that is, the bad act is copying —

The Court: The bad act here was taking advantage of a fiduciary position to walk off with something.

Mr. Jacobs: Well, how was that done. The allegation —

The Court: According to the allegations it was done through the whole scheme about setting up Gasoline — I don't intend to use scheme in the pejorative, by the way. I won't repeat it at all, but you are familiar with its broad outline. Confidential information was shipped to Hong Kong to be used for manufacturing gasoline garments. And people who had that material through their fiduciary position, according to the allegations, walked off with it. In effect, that's the breach according to the claim. And if that's all true it would appear that it is a breach.

Mr. Jacobs: Well, it's a breach because — let's take it in stages. If they had just done that —

The Court: Uh-huh.

Mr. Jacobs: — Just taken the "confidential material" and not done anything with it, is that a breach? That's the question. If it's not, then we have to go to the next stage. Well, then, they breached because they copied it.

The Court: Suppose they took it and gave it to somebody else who made available uses of it; say, they sold it to someone else who proceeded to copy it and they are being sued, not the person that gave it or sold it. Is there a breach?

Mr. Jacobs: There could be a breach, yes.

The Court: All right. It's a breach that sounds independent of the copyright law, isn't it?

Mr. Jacobs: It ... But I think you have to look at what the damages would be in that case.

The Court: All right. Is it your view that in assessing damages the plaintiffs could not introduce evidence as to the use that had been made of the material by the party to whom he sold it?

Mr. Jacobs: I would have a problem with that concept, your Honor. Because the more that you start introducing evidence of copying the more it seems to me to be smacking into the preemption Section 301 and the Supremacy Clause.

The Court: I think your position is, then, that if copying is involved at all and it's to be counted upon as a — as — with respect to a damages claim, then the Supremacy Clause applies because of the copyright law no matter what else may be involved. Is that a correct paraphrase?

Mr. Jacobs: No —

The Court: Then tell me what it is.

Mr. Jacobs: No, because I think you have to add — if you have a matter that falls within the subject matter of copyright and you are looking at copyright-type damages, and you are going to be putting in copyright-type evidence, then I think by virtue of doing that it is clear that you are

not really talking about an extra added element contemplated by Section 301. Then I think it does fall under Title 17.

If you are talking about something that is not within the subject matter of copyright it may be protected through another route. Because if it is not — if it is not within the subject matter of copyright there are two avenues to go. One is you can't protect it at all, and the other is maybe there is some other avenue that you can protect it.

The Court: Let's assume that we are dealing with this in the subject matter that you refer. As I understand it from your papers, it applies either if the matter can be copyrighted and protected or if it's matter as to which Congress has made a decision that it cannot be copyrighted and therefore it is public domain. Either one of those falls within the subject matters. Let's assume that what we are talking about is within the subject matter in that sense.

Mr. Jacobs: Right.

The Court: And with that assumption I put the question to you again. Would my paraphrase be correct as to your position?

Mr. Jacobs: Well —

The Court: Do you have the whole question in mind?

Mr. Jacobs: Yes, I do have the question in mind. It's — I guess I have to come back to what I said before. If you are looking at copyright damages and you are looking at introducing copies, then I don't see what you are adding to a copyright claim even though you have another alleged cause of action tied to it like misappropriation or like breach of fiduciary duty. Because what the court is going to be looking at, and what the jury is going to be looking at, what the determination is going to be is that, yes, they copied. And if that's what everybody is focusing on, yes, they copied, then it's a Title 17 question.

The Court: Thank you.

I am not persuaded, and it is my present intention to deny the motion for judgment on the pleadings. If the responding parties want to be heard notwithstanding that comment, I will hear you.

Mr. Jacobs: Your Honor, before we do that let me just add something.

When we opened the argument you said that you thought breach of fiduciary duty might be a distinguishing factor in the case. And you found that it was a distinguishing factor by virtue of your ruling. However, we also have an unfair competition allegation in the complaint. And even under the theory espoused by your Honor those would be preempted.

The Court: They are all based on the same core factual allegations and, consequently, in terms of the preemption analysis I think they all stand or fall on those allegations.

The ruling will be as follows: deny. The Copyright Act of 1976, and particularly 17 U.S.C. Section 301, preempts state remedies for improper copyrighting of copyrighted and copyrightable material, and matters which Congress has determined should be within the public domain. Terms like "misappropriation" are not helpful in this context, because matters may be misappropriated by the very act of an infringement, or by means which involve an independent tort. The former is preempted; as are some acts that fall within the latter, e.g., the classic situation described in *INS v. AP*, which the parties have cited.

But the gravamen of the plaintiffs' lawsuit as here relevant is that its proprietary information was obtained by the defendants, or by agents or co-conspirators of the defendants, through breach of a fiduciary obligation. Such conduct, if it occurred, is tortious and not preempted by

federal law. *See Sammons & Sons versus Ladd-Fab*, citation.

That motion is denied, and I will proceed now to the next motion, which is the motion to — by Guess? for certain injunctive orders directed toward counsel for Jordache.

(Further proceedings were reported
but are not transcribed herein.)
(End of requested partial transcript.)

Superior Court of the State of California
for the County of Los Angeles

Department No. 44 Hon. Norman L. Epstein, Judge

Georges Marciano, et al.,
Plaintiffs,

No. C 524 347
Reporter's Certificate

vs.

Joe Nakash, et al.,
Defendants.

State of California

ss

County of Los Angeles

I, Claudette L. Bell, official reporter of the Superior Court of the State of California, for the County of Los Angeles, do hereby certify that the foregoing is a true and correct partial transcript of the proceedings held on Monday, September 28, 1987, in the matter of the above-entitled action.

Dated this 30th day of September 1987.

s/s Claudette L. Bell, CRS No. 4104
Official Reporter

APPENDIX B

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
ROBERT N. WILSON, CLERK

DIVISION: 1 DATE: 10/26/87

Coudert Brothers
R. David Jacobs
707 Wilshire Blvd.
Suite 4600
Los Angeles, CA. 90017

RE: Mon. Lee Seck Etc., Et Al.
VS.
Superior Court, County of Los Angeles
Guess?, Inc., Marciano, Georges Etc.
2 Civil B030597
Los Angeles No. C524347

THE COURT:

The petition for writ of Man-Pro is denied.

APPENDIX C

SUPREME COURT
FILED
JAN - 6 1988
Laurence P. Gill, Clerk

DEPUTY

ORDER DENYING REVIEW

AFTER JUDGMENT BY
THE COURT OF APPEAL

2nd District, Division 1, No. B030597

S003023

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

MON, etc., et al., Petitioners,

v.

SUPERIOR COURT OF THE COUNTY OF
LOS ANGELES, Respondent;
GUESS?, INC. et al., Real Parties in Interest.

Petitioners' petition for review DENIED.

LUCAS
Chief Justice